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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001707-WC

HARDIN MEMORIAL HOSPITAL APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-00235

PATRICIA HORNBACK; HON. CAROLINE
PITT CLARK, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

THOMPSON, JUDGE: Hardin Memorial Hospital appeals from an opinion and order of the Workers' Compensation Board affirming the ALJ's award of permanent total disability benefits to Patricia Hornback and an enhanced benefit

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

pursuant to KRS 342.165(1). Hardin does not contest the award of permanent total disability but argues that the ALJ's finding that Hornback's injuries were caused by Hardin's intentional failure to comply with safety laws was not supported by substantial evidence. After a review of the record, we are compelled to agree and reverse.

Hornback suffered injuries when she fell down an elevator shaft while working at Hardin. She has no recollection of the accident. An investigative report from the Kentucky Department of Labor Occupational Safety and Health Program described the accident based on a statement made by a Hardin's security manager. According to the report, Hornback was alone in an elevator when it stalled between the first and second floors. When hospital security arrived, employees opened the door from the first floor hallway and attempted to assist Hornback from the elevator to the hall floor. However, she fell backward into the elevator shaft and down four stories. As a result, Hornback sustained multiple debilitating injuries. The report concluded that there was no safety regulation violation and a citation was not issued.

In response to a request for production of documents, Hardin provided business records including a document published by Otis Elevator Company entitled, "How to Operate Elevators Under Emergency Conditions."[2] The pamphlet specifies the procedure to follow if the elevator malfunctions trapping a passenger. Specifically, the pamphlet requires that a "qualified elevator mechanic"

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[2] The Board concluded that Hardin failed to properly preserve the admissibility of the pamphlet as a business record. The issue is not presented to this Court.

be called to determine if the elevator can be made operational. If not, the pamphlet instructs that the passenger be removed by a fire department or rescue squad.

Hardin contends that Hornback's injuries were caused by the actions of its employees when they failed to safely assist her and not by its intentional violation of its duty to maintain a safe workplace. It vehemently argues that the ALJ's findings of fact were erroneous. Therefore, we set forth the appropriate standard of review.

Because the Board upheld the ALJ's factual findings, we must determine whether the findings were supported by substantial evidence. *Special Fund v. Francis,* 708 S.W.2d 641, 643 (Ky. 1986). Substantial evidence has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chemical Co.,* 474 S.W.2d 367, 369 (Ky. 1971). The ALJ has the sole discretion to evaluate the weight of the evidence presented. *Whittaker v. Rowland,* 998 S.W.2d 479, 481 (Ky. 1999). With this standard of review, we discuss the applicable law and the facts.

Two statutes are pertinent. The imposition of a "safety penalty" in a workers' compensation claim is a statutory remedy created by KRS 342.165(1). It states in part:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or

> methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.

KRS 338.031(1)(a), contained in Kentucky's Occupational Safety and Health Act, provides that employers are required to provide a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to their employees. The statute is commonly referred to as the "general duty" provision because it does not require that a specific directive contained in a statute or regulation be violated.

The Kentucky Supreme Court has held that a violation of the general duty provision is sufficient to support a penalty against an employer pursuant to KRS 342.165(1). *Apex Mining v. Blankenship*, 918 S.W.2d 225 (Ky. 1996). Before the ALJ, Hornback relied on the general duty provision and had the burden to prove that Hardin intentionally violated KRS 338.031(1)(a). *Cabinet for Workforce Development v. Cummins*, 950 S.W.2d 834, 837 (Ky. 1997).

In *Lexington-Fayette Urban County Government v. Offutt*, 11 S.W.3d 598 (Ky.App. 2000), the Court considered the application of the general duty provision to KRS 342.165(1). When determining whether KRS 338.031(1)(a) was violated, the Court adopted a four-part test outlined in *Nelson Tree Services, Inc. v. Occupational Safety and Health Review Commission*, 60 F.3d 1207 (6th Cir. 1995):

> *Nelson Tree* set forth the required elements to establish a violation of a similar federal general duty clause as: "(1)

> [a] condition or activity in the workplace presented a hazard to employees; (2) [t]he cited employer or employer's industry recognized the hazard; (3) [t]he hazard was likely to cause death or serious physical harm; and (4) [a] feasible means existed to eliminate or materially reduce the hazard."

Offutt, 11 S.W.3d. at 600 (footnote omitted).

The ALJ made the four inquires set forth in *Offutt* and focused on the pamphlet provided by Otis Elevator. The ALJ found that the pamphlet was a Hardin safety procedure that it ignored and, further, that the hospital industry recognized the removal of employees from malfunctioning elevators as an industry hazard. The ALJ also found that the improper removal of an employee from an elevator was a hazard likely to cause serious harm or death and that the Otis Elevator pamphlet provided a feasible means to eliminate the hazard. Without a separate analysis, the ALJ was "convinced" Hardin committed an intentional safety violation and imposed a thirty percent penalty.

In the context of a workers' compensation claim, "it is the responsibility of the ALJ to determine whether a violation of a statute or administrative regulation has occurred." *Brusman v. Newport Steel Corporation*, 17 S.W.3d 514, 520 (Ky. 2000). Although a KOSHA citation was not issued to Hardin, that fact is not determinative but merely evidence to be considered by the ALJ. We, likewise, consider it as evidence subject to our standard of review.

Although Hardin's burden of persuasion before this Court is onerous, we are compelled to reverse. As background and to contrast the current case from prior

case law discussing the application of KRS 342.165(1), we briefly summarize the facts in four published cases involving the general duty provision.

In *Apex Mining,* an egregious safety violation was found where a grader with a defective throttle, decelerator and brakes could only be stopped by lowering the grader blade or crashing it into another vehicle. Although no specific statute mandated properly functioning brakes on a grader, the employer was found to be in violation of KRS 338.031(1)(a), and the employee was awarded a penalty enhancement of his workers' compensation benefits. Similarly, in *Offutt*, an employer who required a police recruit to complete a two-mile running exercise during dangerously hot weather, resulting in the employee suffering a heat stroke, violated KRS 338.031(1)(a). In *Brusman,* an employer was assessed a penalty when an employee was crushed between two railroad cars while riding on the outside of the moving car. Even though employees were forbidden to ride on the moving cars, the ALJ found that the employer was aware that the practice was ongoing and had not disciplined any employee for doing so. Thus, the presence of defective cars sitting on an adjacent track created a patently obvious safety hazard.

By contrast, in *Cummins*, a vocational education teacher who sustained cumulative injuries from years of exposure to chemicals was not entitled to an enhanced benefit because of the absence of a ventilation system and monitors in his shop. The shop was the size of a three-to-four-car garage with a garage door and two regular doors which were often kept open. The ALJ found that the employer's failure to provide mechanical ventilation or respirators did not create an

obvious safety hazard and, therefore, it did not violate the statutory requirement to provide a safe workplace.

As revealed by our summarizations, the violations committed by the employers in previous Kentucky cases were egregious and the safety hazards were or should have been known to the employers. The factors in *Offutt* were established by substantial evidence. Although the ALJ considered the *Offutt* factors in this case, the finding that Hardin intentionally violated its general duty to provide a safe workplace is not supported by the evidence.

The first inquiry is whether a condition or activity constituted a hazard to employees. Hornback's entrapment in the elevator was known only by co-workers who decided to free her from the elevator in a manner that was ill-advised but not at Hardin's managerial personnel's instruction. We conclude that "a condition or activity" as contemplated by *Offutt*, does not include the one-time malfunctioning of an elevator. It was an unanticipated event responded to by employees without direction from Hardin.

The reasoning of the ALJ, and that adopted by the Board, was that the instruction given by Otis Elevator to Hardin was a Hardin "safety policy." The breadth of such reasoning is exemplified by two questions presented by Hardin. Do the directions provided by a copy machine operator to avoid burns or electrocution when resolving a paper jam constitute a safety policy? Must all employees be instructed to follow the manufacturer's instructions regarding the proper use of a fire extinguisher? The scenarios are infinitesimal. We are not

convinced that KRS 338.031(1)(a) imposes such an onerous duty upon employers nor that the penalty provision contained in KRS 342.165(1) mandates that an employer be an absolute insurer of its employees' safety.

We comment further. Even if correct in finding the first factor in *Offutt* was satisfied, the ALJ was required to find that the "industry," in this case a hospital, recognized the hazard of improper removal of an employee trapped in an elevator. Although removal from a malfunctioning elevator is a plausible event, it is not a hazard associated with hospital employment.

Because substantial evidence does not support the ALJ's finding that Hornback's workplace presented a "hazard" recognized by Hardin's industry, the remaining factors delineated in *Offutt* are irrelevant. All four factors must be present to impose a penalty pursuant to KRS 342.165(1). Although for the purpose of brevity our discussion could end, we discuss a question presented by Hardin: Was the ALJ required to make a finding of fact as to whether the alleged safety violation was intentional?

Two elements are contained in KRS 342.165(1): (1) a violation of KRS 338.031(1)(a), and (2) an intentional violation. An "intentional failure" is a separate and distinct element. In *Barmet of Kentucky, Inc. v. Sallee*, 605 S.W.2d 29 (Ky.App. 1980), the Court defined "intentional failure" to comply with a statute or regulation as an essential element under KRS 342.165. The Court quoted persuasive authority:

> We are asked, in this case, to define intentional failure. We note that neither "intentional" nor "intention" is defined in the compensation act but intention is also used in KRS 342.610. Webster defines intention as "a determination to act in a certain way or to do a certain thing; purpose; design." Another lexicographer states that intention is "a settled direction of the mind toward the doing of a certain act." The Penal Code states that a person acts intentionally "when his conscious objective is to cause ..." KRS 501.020(1).
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> Larson points out that courts are often very restrictive in interpreting misconduct provisions of compensation statutes when the result is a loss of all benefits such as in KRS 342.610(3) and (4) and should be more "straightforward" when the result is a penalty. Neither we nor the Workmen's Compensation Board are free to apply a less rigorous standard for the imposition of a penalty than the standard mandated by the legislature. In Kentucky, in penalty cases, the standard is an intentional failure. It applies both to employees and employers.

Id. at 31-32 (footnotes omitted).

We reaffirm this Court's prior holding. Absent a finding that the violation was intentional, a safety penalty cannot be imposed upon an employer pursuant to KRS 342.165(1). "Intentional" requires that the fact finder determine whether an employer ignored or willfully overlooked a safety hazard that was reasonably foreseeable.

For the reasons stated, the opinion and order of the Workers' Compensation Board is reversed and the case remanded to the ALJ with directions to issue an opinion and order denying the request for penalty pursuant to KRS 342.165(1).

ALL CONCUR.

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